

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.764 of 1977

(Against the judgment and decree dated 30.07.1977 passed by Sri Raja Ram Singh, 1st Additional Sub Judge, Begusarai in Title Suit No.45 of 1967/72 of 1973).

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Bachhi Devi & Ors

.... Defendants-Appellants

Versus

Madho Singh & Ors

.... Plaintiffs-Respondents

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Appearance :

For the Appellant/s : Mr. S.S. Dvivedi, Sr. Advocate
Mr. Binod Kumar Singh, Advocate with him
Mr. Chinta Haran Singh, Advocate
Mr. Madan Pd.Singh-2, Advocate

For the Respondent/s : Mr. Chhotelal Narayan Singh, Advocate
Mr. Pramod Kumar, Advocate
Mr. Ravi Bhardwaj, Advocate
Mr. Surendra Kumar, Advocate

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

CAV JUDGMENT


Date: 17-04-2012

Mungeshwar The defendants have filed the present First Appeal against the
Sahoo, J. judgment and decree dated 30.07.1977 passed by Sri Raja Ram Singh, the
learned 1st Additional Subordinate Judge, Begusarai in Title Suit No.45 of
1967/72 of 1973 decreeing the plaintiff-respondent's suit to the extent of half

share on part suit property.

(2) The original plaintiff-respondent, Banarsi Singh with his two sons filed Title Partition Suit No.45 of 1967 alleging that one Babu Horil Singh was the common ancestor of the parties. He had three sons namely, Harakh Singh, Ritlal Singh and Rangoo Singh. The line of Rangoo Singh extinct. The plaintiffs are the descendants of Harakh Singh whereas the defendants are the descendants of Ritlal Singh. The plaintiff has given full genealogy in the plaint according to which Horil Singh had three sons namely, Harakh Singh, Ritlal Singh and Rangoo Singh. Harakh Singh had three sons namely Chaman Singh, Matuki Singh and Maula Singh. The son of Chaman Singh namely Banarsi Singh is the original plaintiff no.1. His two sons are plaintiff nos.2 and 3. Ritlal Singh had three sons namely Gopi Singh, Kali Singh and Sia Prasad Singh. Gopi Singh had two sons namely Dwarika Singh and Chano Singh. Dwarika Singh had two sons namely Raghubansh Singh and Yadubansh Singh who are defendant nos.4 and 5. Raghubansh Singh had one son, Narayan Singh, defendant no.5 whereas the three sons of Yadubansh Singh are defendant nos.7 to 9. The three sons of Chano Singh @ Chandrashekhar Prasad Singh are defendant nos.10 to 12 namely Chhote Singh, Bal Singh and Bhirgu Singh. The sons of defendant no.10 are defendant nos.13, 14 and 15 whereas sons of defendant no.11 are defendant nos.16 and 17. The only son of defendant no.12 is defendant no.18.

(3) The second son of Ritlal Singh, i.e., Kali Singh had two sons namely Udit Narayan Singh and Shankar Sharan Prasad Singh. Udit Narayan Singh had three sons, Lallan Singh, Madan Singh, Ranjan Singh. Lallan Singh is defendant no.19 and his only son Birja Singh is defendant




no.22. Madan Singh is defendant no.20 and his only son Kishore Singh is defendant no.28. The three sons of Shankar Sharan Prasad Singh are defendant nos.23, 24 and 25 whereas Shankar Sharan Prasad Singh himself is defendant no.1. Sia Prasad Singh had two sons Pratap Singh who is defendant no.2 and his three sons are defendant nos.29, 30 and 31. The only son of defendant no.29 is Narayan who is defendant no.32. The three sons of defendant no.30 namely Haldhar Singh are defendant nos.33, 34 and 35. The second son of Sia Prasad Singh namely Gangotri Singh is defendant no.3 whereas his two sons Nand Kumar Singh and Brij Kumar Singh are defendant nos.26 and 27. The third son of Horil Singh namely Rangoo Singh had two sons Bhatu Singh and Bhoop Singh. Bhatu Singh died leaving behind widow, Jhalo @ Kherahia Wali. Bhoop Singh died issueless.

(4) According to the plaintiffs, the family of the parties had large area of joint family properties in the nature of Raiyati kaymi lands and Milkiyat interest and different taujis along with Bakast lands. All the members of joint family were in joint possession of the same and Babu Ritlal Singh was the karta of the family. Many properties were acquired by the members of the joint family in the name of one or the other family members but mostly in the name of karta of the family, i.e., Babu Ritlal Singh out of the income and savings of the joint family properties. Babu Rangoo Singh died long ago in jointness with his brothers leaving behind two sons namely, Bhatu Singh and Bhoop Singh. Both of them died issueless. Bhatu Singh left behind widow, Jhalo who remained joint. Harakh Singh had three sons namely, Chaman Singh, Matuki Singh and Maula Singh. The original plaintiff, Banarsi Singh is the son of Chaman Singh. The other two sons of

Harakh Singh died issueless in the state of jointness with Chaman Singh. Babu Chaman Singh separated himself from sons of Babu Ritlal Singh but the entire joint family properties remained in joint possession of the parties. Widow of Bhatu Singh namely, Masomat Jhalo was known as Kherahia Wali according to the name of her village.


(5) The further case of the plaintiffs is that for the sake of convenience of cultivation without reference to shares, the sharers were cultivating some portion of land under partition separately. After vesting the lands which were in possession of parties became Raiyati kaymi lands. Although, Babu Chaman Singh, father of plaintiff had separated, the management of the properties continued to be done by Gopi Singh and Babu Kali Singh, sons of Ritlal Singh on behalf of the entire family of the parties. The entire land of village Gangaprasad which is substantial area is subjected to annual submersion and erosion by the river Gangas but for few years, it is being cultivated. The further case of the plaintiff is that the defendants have also separated themselves and the plaintiffs feel difficulty in joint possession and cultivation of the lands. Six bighas of land which were given to Masomat Jhalo for her maintenance has reverted back to the parties after her death is also liable for partition. The separate schedules have been given describing in details the properties with the plaint. The plaintiffs have got half share in the suit property mentioned in detail in the schedules.

(6) The defendant nos.2,3,26,27,29,30 and 31 filed a joint separate contesting written statement. Their case in short is that there is no unity of title and possession between the parties. After the death of Horil Singh, Harakh Singh, the eldest member of the family became the karta long



long ago much before the cadastral survey, he completely separated from his brothers, Ritlal singh and Rangoo Singh in mess, residence and properties and partitioned all the properties including the immovable properties by metes and bounds. The other two brothers, Ritlal Singh and Rangoo Singh remained joint. Bhatu Singh and Bhoop Singh predeceased their father, Rangoo Singh in the state of jointness. Thereafter in 1900(1307 Fasli), Rangoo Singh also died in the state of jointness with Ritlal Singh and his sons. The three brothers had only a very meager joint family property. In the partition, Harakh Singh got 1/3rd share and came in possession thereof and the remaining 2/3rd share came in possession of Ritlal Singh and Rangoo Singh who continued in possession thereof. After the separation of Harakh Singh, the two brothers Ritlal Singh and Rangoo Singh acquired extensive properties by dint of their hard labour, trade and even after death of Ritlal Singh and Rangoo Singh, the sons of Ritlal Singh acquired extensive properties with which the branch of Harakh Singh had no concern. The plaintiff who is grandson of Harakh Singh, knowing fully the above facts, has filed this mischievous false suit with dishonest motive to harass the defendants.

(7) Regarding the genealogy, it is stated that Rangoo Singh had one daughter namely, Mantorano Devi and predeceased sons and daughters. A separate genealogy table has been given at the foot of the written statement. No properties were acquired when the three brothers were joint. There was no saving in the family as the income was very scanty. After separation of Harakh Singh, gradually the properties have been acquired either by Ritlal Singh or Rangoo Singh or by sons of Ritlal Singh. Harakh Singh died in the year 1899(1306 Fasli) in the state of jointness with his sons and was separated




from his two brothers. Rangoo Singh died in jointness with Ritlal Singh in the year 1900. His sons had predeceased him. On the death of Rangoo Singh, his interest devolved on Ritlal Singh by rule of survivorship. Jhalo was the daughter of Bhatu Singh and the name of widow of Bhatu was Kherahia Wali @ Murchha Devi. In the year 1932, when there was partition between the descendents of Babu Ritlal Singh in Title Partition Suit No.58 of 1929 in compromise, 5 bighas 19 katthas and 18 dhurs was given for maintenance to Masomat Murchha Devi. Subsequently, Chaman and Matuki separated from one another and Chaman Singh also died in the year 1934 and Matuki Singh died in the year 1941 in the state of separation from each other. Matuki Singh died leaving behind two daughters namely, Masomat Sohaga and Masomat Baso. Baso was married with Rambadan Singh of village Bikram. Sohago has 4 sons namely, Ramashish Singh, Ramchandra Singh, Ram Babu Singh and Phulena Singh. Baso became widow without any issue. On the death of Matuki, his heirs inherited his property and they are in peaceful possession thereof.

(8) Since Harakh Singh himself had completely separated from Ritlal and Rangoo long long ago and, therefore, there was no joint family and as such, the question of Chaman Singh separating from sons of Ritlal Singh does not arise. The plaintiffs falsely alleged that Chaman Singh separated from sons of Ritlal Singh and the joint family property remained joint. There had been separation and partition long before cadastral survey between Harakh Singh on the one hand and Ritlal Singh and Rangoo Singh jointly on the other hand. After this partition, there had been self-acquisition made by joint family of Ritlal and Rangoo. In the cadastral survey, lands of Harakh

Singh were separately recorded in the name of his sons, Chaman Singh and Matuki Singh. The ancestral properties as well as subsequent acquisition were separately recorded in the name of Ritlal Singh and widow of Rangoo Singh namely Budhano Kuer.

(9) After separation and partition, Harakh Singh begun to take loans from various persons including Ritlal Singh and Rangoo Singh. After his death, even Chaman Singh and Matuki Singh also took loan from Ritlal Singh and sons of Ritlal Singh. After vesting, the properties have been recorded in the name of the defendants and there was no Bakast land owned and possessed by the plaintiffs at the time of vesting of zamindari as by that time, the plaintiffs have sold all their lands. After separation and partition, Harakh Singh became karta of his family and on his death, his sons were looking after the affairs and management of their own joint family properties. Subsequently, they also separated from each other. Gopi Singh and Kali Singh, sons of Ritlal Singh were never the karta of joint family nor they ever managed the property. Gopi Singh has predeceased his father, Ritlal Singh.

(10) Regarding the lands of Gangaprasad village is concerned, it is stated that the plaintiff's ancestor had very small share in that Mauja. Chaman Singh and Matuki Singh had orally sold the said lands to the ancestor of the defendants and put them in possession over the same. After the death of ancestors, the defendants are coming in peaceful cultivation of the same. There were more than 100 co-sharers in the said village and unless all of them are made parties, the partition suit is liable to be dismissed for non-joinder of necessary parties. The further case is that the statement of the plaintiff to the effect that the defendants are separate amongst themselves is correct. There



was Title Partition Suit No.58 of 1929 which was filed by Chandrashekhar Prasad Singh, one of the sons of Gopi Singh. By a compromise decree dated 21.02.1932, partition was affected between the members of the joint family of branch of Ritlal Singh. In the said compromise, 2 annas 8 pies share was allotted to the plaintiffs. Dwarika Prasad Singh and his sons got 2 annas 8 pies. Kali Singh, son of Ritlal Singh and his sons got 5 annas 4 pies. Sia Prasad Singh, son of Ritlal Singh and his sons got 5 annas 4 pies. All these properties have been falsely and intentionally and dishonestly included describing the same as joint family property. Subsequently, there had already been further partition, Pratap Narayan Singh, son of Sia Prasad Singh in the one hand and Gangoti Prasad Singh and his sons on the other hand.

(11) The further case of the defendants is that after partition, Harakh Singh and his sons incurred loans for meeting their necessity and they could not repay the loans so they sold their properties from time to time to the ancestors of these defendants jointly after survey. A time came when they were left with no property and were on the point of starvation. Therefore, out of sympathy, Ritlal Singh gave 8 bighas 18 katthas 15 dhurs of land of plot no.3061 part of plot no.3081, plot nos.5, 10, 11 and 23 to Chaman Singh and Matuki Singh, ancestor of the plaintiffs for their maintenance without any right of alienation. On the extinct of line of Harakh Singh, the property was to revert back to the branch of Ritlal Singh. The plaintiffs are enjoying the said properties till today. In the compromise, in Title Partition Suit No.58 of 1929, the above fact has been mentioned. After death of Kherahia Wali, the properties given to her for maintenance reverted to the family of Ritlal Singh as on the same condition it was given in maintenance. No land described in



schedule is joint family property. Plot no.42, 169, 262, 29/1286, 179 and 2 bighas 11 katthas 5 dhurs in plot no.35 and schedule no.6, plot no.46 of schedule no.47, schedule no.8 except plot no.2 are the lands belonging to the strangers. One of the suit properties have already been sold long long ago by the different defendants and their ancestors also and the purchasers are in possession thereof. The sold properties are described in schedule 1 being plot no.4071, part of plot no.3204 of schedule 3, part of plot no.35, 1 bigha 1 kattha 10 dhurs in schedule 6. Plot no.23 belongs to the plaintiffs exclusively which he has settled with Kamali Singh and Ram Kripal Singh in 1950-1952 which has been given in schedule 4 of the plaint. Lands of khata no.282 mentioned in schedule 9 are possessed by these defendants along with more than 100 co-sharers and plaintiff had no interest. The suit has been filed with dishonest intention. The ancestor of the plaintiff gradually sold their various lands orally to the ancestor of the defendants about 60 years ago in several installments and the defendants are in possession thereof. The said oral sales involved very small amounts of consideration money always much below Rs.100. In written statement, further very minute details have been given as to the recording of the names of the parties with respect to each plot. These facts are admitted facts and, therefore, not necessary for full description. The main defence has been stated above.

(12) The other defendants appeared and they adopted the written statement filed by the above defendants. It appears that subsequently by amendment, many other properties were added in separate schedules and therefore, the concerning defendants filed their additional written statement regarding the amendment claiming that in fact, the properties are their


properties which were allotted to them in partition.

(13) On the basis of the aforesaid pleadings, the learned court below framed the following issues:

- I. Is the suit as framed maintainable?
- II. Have the plaintiffs any right or cause of action to sue?
- III. Is the suit barred by limitation?
- IV. Is the suit barred by law of estoppel, waiver and acquiescence?
- V. Is the suit under valued and court fee paid in sufficient?
- VI. Is the suit bad for the defect of the parties?
- VII. Did Harakh Singh separate and did his other two brothers Ritlal Singh and Rangoo Singh remain joint?
- VIII. Is the story oral purchase as set up by the defendants, correct?
- IX. Did Harakh Singh grandfather of Plaintiff No.1 completely separated from the ancestors of the defendants?
- X. Are the plaintiffs entitled to get a decree for partition as prayed for?
- XI. To what other relief or reliefs, if any, are the plaintiffs entitled to?


(14) After trial, the learned court below came to the conclusion that since the defendants alleged that there had been partition between Harakh Singh in one hand and Ritlal Singh and Rangoo Singh on the other hand, the onus is on the defendant to prove this fact but the defendants failed to prove the partition alleged by them. The learned court below also came to the conclusion that the defendants failed to prove oral sale. The Partition Suit No.58 of 1929 will not affect the right and title of the plaintiffs as the ancestors of the plaintiffs were not made party. The defendants failed to prove the self-acquisition of the properties by Ritlal and his sons out of





their own income. The separate mess, residence, cultivation of land, dealings of properties by the parties is not conclusive proof of partition. The defendants failed to prove the time of partition and year of partition. The presumption of jointness between the brothers is stronger and the allegation made by the defendants is that Harakh Singh separated long long ago prior to cadastral survey. Therefore, the burden was on the defendants to revert this presumption but failed to do so. On these findings, the learned court below came to the conclusion that there is unity of title and possession between the parties and since Rangoo Singh died, his properties devolved on Harakh Singh and Ritlal Singh, the plaintiffs have got half share in the properties. However, the court below found that some of the properties mentioned in the schedule of the plaint are properties of the strangers or the purchasers are in possession thereof and, therefore, excluded from partition and thus decreed the plaintiff's suit in part for some properties.

(15) The learned senior counsel, Mr. S.S. Dvivedi appearing on behalf of the appellants submitted that the original owner of the ancestral properties was Horil Singh. The plaintiff is the 4th generation whereas some defendants are 5th generation and some are 6th generation. No doubt, there is presumption of jointness to the effect that every Hindu family is joint in food, worship and estate till the proof of division but in the present case, the suit has been filed for partition by the plaintiff who himself was 4th generation from the original founder. In such circumstances, the presumption of jointness is nil in the present case. Moreover, the plaintiff himself in the plaint admitted the fact that his father separated in mess and cultivation for convenience. Therefore, the learned court below has wrongly on the basis of presumption




only decreed the plaintiff's suit. There are overwhelming evidences on record to show that prior to cadastral survey, Harakh Singh had separated himself in all respects and, therefore, the properties were recorded separately in the name of his sons in the cadastral survey record of rights in the year 1902. After more than 6 decades, the plaintiffs are now claiming that there had been no partition alleged by the defendants. There are also inter se transactions. The plaintiffs themselves in the plaint admitted that the defendants also separated and there are inter se transaction but then the learned court below without considering the legal position and the settled proposition of law laid down by the Apex Court as well as by this court held that there was no partition long long ago prior to cadastral survey and, therefore, there is unity and title and possession between the parties and decreed the suit.

(16) The learned counsel further submitted that admittedly Harakh Singh was the eldest brother and therefore, during lifetime of Harakh Singh, Ritlal could not have been the karta of the family but wrongly the plaintiff's case has been relied upon and it is held that properties have been acquired by the karta in his name. The learned court below also wrongly not relied upon the partition decree passed in Title Partition Suit No.58 of 1929 which was between the sons of Ritlal Singh. When there was separation and partition between the sons of Ritlal, there cannot be the case that the sons of Horil Singh were joint. The learned court below did not consider the inter se transaction and the cumulative effect of separate residence, separate cultivation, separate dealings, separate acquisition and inter se transaction for more than 6 decades. According to the learned counsel, the learned court below has approached the case in wrong angle. On these grounds, the learned

counsel submitted that the impugned judgment and decrees are liable to be set aside and the plaintiff's suit for partition is liable to be dismissed with cost.


(17) On the contrary, the learned counsel, Mr. Chhotelal Narayan Singh appearing on behalf of the respondents submitted that there is no illegality in the impugned judgment and decree. According to the learned counsel, the Hindu family is presumed to be in joint. The defendants alleged that there had been partition between the parties, i.e., Harakh Singh separated prior to cadastral survey, the other two brothers Ritlal and Rangoo remained joint. So far this case is concerned, it is for the defendant to prove that Harakh Singh separated. The only case of the plaintiff is that Harakh Singh also remained joint with the two brothers. In such circumstances, the learned court below has rightly decreed the plaintiff-respondent's suit for partition. Since Ritlal Singh was educated person and clever man, he was managing the property and was the karta. No doubt, the plaintiffs have stated that Chaman Singh was separated from the sons of Ritlal Singh but the said separation was for the convenience. In spite of the said separation, the property was being managed by the sons of Ritlal Singh namely, Kali Singh who was karta. Since there was large extent of property and all the properties acquired in the name of karta, Ritlal Singh out of the income of joint family property will be presumed to be the joint family property and the onus will be on the defendants to prove that they acquired the property without the aid of joint family fund. The Title Partition Suit No.58 of 1929 was filed by one of the sons of Ritlal Singh and in that case, the branch of Harakh Singh was not made party and moreover, there was no final decree in the said suit. In such circumstances, the learned court below has rightly held that it will not affect





the right of the plaintiffs. The plaintiffs have got no property whereas the defendants are in possession of large extent of property which shows their dishonest intention. In the evidence, it has been admitted that Ritlal and his sons were going to the survey authorities during cadastral survey and, therefore, they managed and got their names mutated as Ritlal Singh was very clever man and was only educated whereas the plaintiffs were simple villagers, uneducated and were tending the cattle. All the properties have been acquired either in the name of Ritlal Singh or his sons when he was karta of the joint family, therefore, it is joint family property. The separate residence, mess and dealing of the properties are not the proof of partition. The defendants have not given either the month or the year and the manner of partition. No details have been given by the defendants as to which property was given in the share of Harakh Singh in the alleged partition. To prove the oral sell by the ancestor of the plaintiffs, no direct evidence has been adduced by the defendants. So far separate dealing of the property is concerned, according to the learned counsel, since the plaintiffs or their ancestors were in starving point, therefore, they were compelled to sell some of the properties but that do not mean that there had been partition between the sons of Horil Singh as alleged by the defendants.

(18) The learned counsel relied upon **AIR 1962 SC 287(Bhagwan Dayal vs. Mostt. Rewati Devi)** and submitted that the general principle is that every Hindu family is presumed to be joint unless contrary is proved but this presumption can be rebutted by direct evidence or by course of conduct. There is no presumption that when one member separates from others, the later remained united. Whether the later remained united or not




must be decided on the facts of each case. In the present case, considering the facts, the learned court below found that there had been no separation of Harakh Singh from his two brothers. The learned court below has dealt with all the oral as well as documentary evidences and, therefore, in First Appeal, the findings recorded by the court below cannot be interfered with.

(19) It may be mentioned here that the parties have filed their written arguments giving in great details, the pleadings, the evidences and the points submitted before this court. Paper book has also been filed. During the course of arguments, both the learned counsels placed in extenso all the evidences documentary as well as oral to their best ability. Considering their hard labour and great assistance given to this court to the expectation and satisfaction, if they are not praised, the judgment will be incomplete.

(20) However, considering the above rival contentions of the parties, the only point arises for consideration in this appeal is as to “whether there is unity of title and possession between the parties and the plaintiffs are entitled for partition of their half share as claimed and decreed by the court below?”

(21) The plaintiffs claimed for partition to the extent of half share alleging that Horil Singh had three sons namely, Harakh Singh, Ritlal Singh and Rangoo Singh. The plaintiffs represent the branch of Harakh Singh whereas the defendants represent the branch of Ritlal Singh. The branch of Rangoo Singh extinct. There had been no partition between the parties. On the other hand, according to the defendants, there had already been partition prior to cadastral survey and Harakh Singh separated from his two brothers. Accordingly, in the cadastral survey record of right, the properties allotted in



his share were recorded in the name of his sons whereas the properties allotted to his two brothers were recorded in the name of Ritlal or his sons. In support of their respective cases, the parties have adduced evidences oral as well as documentary. In paragraph 8 of the plaint, the plaintiffs specifically mentioned that after the death of Matuki and Maula, the plaintiff's father namely, Chaman Singh separated from the sons of Babu Ritlal Singh. At paragraph 10, it is mentioned that for the sake of convenience of cultivation without any reference to the shares, the sharers cultivated some portion of the lands under partition separately. Therefore, the separate cultivation during the lifetime of father of plaintiffs is admitted by the plaintiffs themselves. At paragraph 12, it has been stated that although, Chaman Singh had separated but the management of the properties continued to be done by Babu Gopi Singh and Babu Kali Singh, sons of Ritlal Singh. At paragraph 14, it has been stated that the defendants have also separated among themselves. In such circumstances, according to the plaintiffs themselves, the parties were separate since the lifetime of Chaman Singh. Even the defendants also separated and the parties were cultivating the lands separately. The only case of the plaintiffs is that this cultivation was according to the convenience. In such view of the matter, there was severance of coparcenary status but at paragraph 4 of the plaint, it has been mentioned that Ritlal Singh was the karta of the family and likewise, at paragraph 12, it is stated that after even separation of Chaman Singh, plaintiff's father, the branch of Ritlal Singh, i.e., Gopi Singh and Kali Singh were managing the property being the karta. This case of the plaintiffs appears to be inconsistent with each other. When there had been severance of the joint family status during lifetime of Chaman and

he was cultivating some lands separately, may be it for the sake of convenience but in such circumstances, how the property was being managed by the branch of Ritlal Singh.

(22) In the case of **Kalyani vs. Narayanan and Ors., 1980(2) Supreme Court reports 1130**, the Apex Court at paragraph 3 has held as follows:

“3. Partition is a word of technical import in Hindu law. Partition in one sense is a severance of joint family status and coparcener of a coparcenary is entitled to claim it as a matter of his individual volition. In this narrow sense all that is necessary to constitute partition is a definite and unequivocal indication of his intention by a member of a joint family to separate himself from the family and enjoy his share in severalty. Such an unequivocal intention to separate brings about a disruption of joint family status, at any rate, in respect of separating member or members and thereby puts an end to the coparcenary with right of survivorship and such separated member holds from the time common. Such partition has an impact on devolution of shares of such members. It goes to his heirs displacing survivorship. Such partition irrespective of whether it is accompanied or followed by division of properties by metes and bounds covers both a division of right and division of property. A disruption of joint family status by definite and unequivocal indication to separate implies separation in interest and in right, although not immediately followed by a de facto actual division of the subject-matter. This may at any time, be claimed by virtue of the separate right. A physical and actual division of property by metes and bounds follows from disruption of status and would be termed partition in a broader sense.”

(23) In view of the above settled proposition of law laid down by the Apex Court, such separation puts an end to the coparcenary with right of survivorship. When status of coparcenary family seized or put to an end,

how can there be a karta of one branch to the family of another branch.


(24) It is well settled principles of law that generally speaking the normal state of every Hindu family is presumed to be joint in the absence of proof of division. This presumption is stronger in the case of brothers than in the case of cousins as the farther you go from the founder of the family, the presumption becomes weaker and weaker. The reason is that brothers are for the most part remained undivided, second, cousins are generally separated and third, cousins are for the most part separated. In this present case, the admitted position is that Horil Singh was the common ancestor of the parties. The plaintiffs are 4th generation whereas some defendants are 5th generation and some are 6th generation. Therefore, here the presumption which was in favour of the plaintiff is nil.

(25) The learned counsel for the respondents submitted that it is the case of the defendants that Horil Singh had separated and, therefore, the separation is pleaded between the brothers. In such circumstances, the presumption is stronger in this case. So far this submission is concerned, we are not considering here the suit filed by either Horil Singh or Ritlal Singh. As alleged by the defendant, the partition had taken place long ago prior to cadastral survey. Cadastral survey concluded in the year 1902. Harakh Singh died in the year 1899. The suit has been instituted in the year 1967 and the plaintiff is claiming that there had been no partition prior to 1899. In view of the above fact, only on the presumption, it cannot be held that there is unity of title and possession. As stated above, we are considering the partition between the parties who are either the 4th generation or the 5th or 6th generation.

(26) Now let us consider the evidences of the parties. P.W. 3 is


Banarsi Singh, the original plaintiff no.1. In his evidence, he has admitted that there had been partition amongst the descendents of Ritlal Singh. He has also admitted that there had been separate alienation by the parties and at paragraph 23, he has admitted that about 9 bighas land was given to him in Dan, i.e., gifted to him by Ritlal. It may be mentioned here that this is the case of the defendants that there was no land with the branch of Harakh Singh and, therefore, for their maintenance, Ritlal had given about 9 bighas of land. The question arises is if the parties were joint then how one branch, i.e., one member of the joint family will give the joint family property in gift to the other member of the joint family. In my opinion, this will amount to inter se transaction. P.W. 2 has stated that all the 3 sons of Horil Singh were joint and that the branch of Rangoo Singh extinct and that no partition had taken place between the 3 brothers. The properties of the 3 brothers remained joint. They were in possession of huge ancestral properties which gradually increased. Ritlal Singh was the karta and after him, Kali Singh became the karta of the family and thereafter, Dwarika Singh was the karta and at present, Pratap Narayan Singh is the karta of the family. As stated above, P.W. 3 is the original plaintiff himself. These are the material witnesses on the point of partition between the parties.

(27) Now let us examine the documentary evidences produced by the plaintiffs. The plaintiffs have produced Exhibit 2/j, 2/n, 2/p, 2/s and 2/t. Exhibit 2/j is equal to Exhibit DD produced by the defendants. Exhibit 2/n is continuous khatian of tauji no.830, khata no.74 and 75 wherein share of Matuki Singh and Chaman Singh have been shown to be 47 decimals and 30



decimals as Bakast Malik and share of Ritlal is shown 4 acres 1 decimal as Bakast Malik. The learned counsel for the plaintiffs-respondents submitted that because Ritlal was karta and he was attending the survey authorities during survey, he got his name entered regarding the maximum area. Exhibit 2/p is khewat of Mauja Gangaprasad. In khewat entry no.1/5 in tauji no.830/6, the shares of Ritlal Singh and Masomat Budhnu Kumari is jointly recorded and in tauji no.830 share of Chaman Singh and Matuki Singh is jointly recorded having equal share. The learned counsel submitted that from perusal of all the entry barring meager share almost all shares are recorded in the name of Ritlal Singh and Budhnu Kumari. On the strength of this document, the learned counsel submitted that had there been partition, the property would have been recorded in equal share in the name of 3 brothers.

(28) The learned counsel placed Exhibit 2/s which is khewat of Mauja Miachak with respect to tauji no.1412. On the strength of this document, the learned counsel for the respondents submitted that the share of Ritlal Singh and share of Chaman Singh and Matuki Singh are recorded as half and half. Therefore, the claim of the defendant that Chaman Singh and Rangoo Singh got 2/3rd share is wrong. Exhibit 2/t shows that share of Ritlal Singh is separately recorded and the share of Chaman Singh and Matuki Singh is separately recorded and likewise, the share of Rangoo Singh was recorded in the name of Masomat Budhnu. Exhibit 2/I is continuous khatian of Mauja Malpur in tauji no.830. Only 96 decimals of land is recorded in the name of Chaman Singh in khata no.6 and land measuring 2 acres 33 decimals is recorded in khata no.40 in the name of Ritlal Singh. The plaintiffs have also produced Exhibit 2/k, 2/n, 2/o which are continuous khatians of



different Maujas. Exhibit 2/u is khewat of Mauja Sikandarpur. Exhibit 2/h is khewat of Mauja Gangaprasad. Exhibit 2/q is of Mauja Gangaprasad in tauji no.830/9. All other documents i.e. Exhibit 2 series are either continuous khatiyans or the khewats. All these documents are of the year ranging from the year 1895-96 to 1907-08.

(29) Exhibit-3 is register prepared under Section 6 and 7 of Bengal Council Act, 1896. Exhibit 3/D series are the Register-D of Mauja Gangaprasad, Mauja Bishunpur, Mauja Chakjivan, Mauja Maksapur Chintavan, Mauja Malpur, Mauja Lodipur and Mauja Maksapur yaku. These registers have been produced by the plaintiffs to show that there was joint account in the name of the 3 brothers and it is specifically mentioned that the properties are Ijmal. The properties were in the name of 3 brothers in equal shares and there was no reference of any partition. Much emphasis has been given at the time of the hearing of the appeal on the different entries and submitted that all these exhibits point towards the jointness of all the 3 brothers and not the separation of Harakh Singh as claimed by the defendants-appellants.

(30) Exhibit-4 series have also been produced to show that the joint family property was firstly brought in the name of Rangoo Singh and thereafter by inheritance, Ritlal Singh inherited all the properties. Exhibit-1 is the statement of Ritlal Singh made in the year 1902 in Title Suit No.223-224 of 1900 wherein he has stated that the lands of Mauja Gangaprasad was in separate possession of the landlords. Exhibit-5 is the certified copy of the decree passed in Title Suit No.456 of 1914. All these documents relate to prior to 1914. These are the documentary evidences produced by the

plaintiffs.

(31) On the contrary, the defendants have produced various documents and also examined many witnesses. D.W.1, Babulal Singh, D.W.4, Jugal Kishore Singh, D.W.16, Ved Narayan Singh, D.W.24, Rameshwar Rai, D.W.38, Khelo Rai, all have supported the defendant's case and have stated that there had been separation by Harakh Singh from his two brothers. D.W.41, Brahmdeo Singh has also stated that there had already been partition between the parties. D.W.7, D.W.8, D.W.18, D.W.35, D.W.40, D.W.44 all have supported the case of the defendants that there had already been partition between the parties. Likewise, D.W.15, D.W.17, D.W.47, D.W.48 and D.W.51 have also supported about previous partition. D.W.59 is Pratap Narayan Singh who is defendant no.2. Admittedly, it is the case of the plaintiff himself that his father had separated from the sons of Ritlal Singh. Therefore, separation is admitted. Separate residence is admitted. The documents produced by the plaintiff relates to the year 1895-96 to 1907-08. According to the defendants, there had been partition long long ago prior to cadastral survey. The cadastral survey ended in the year 1902. In view of the above facts, admittedly, this partition alleged by the defendants is one of the oldest transactions and it is also admitted that there is no contemporaneous documents and most of the persons present in the transaction or during the period of transaction have passed away. In such circumstances, the subsequent conducts of the parties are required to be seen. The defendants-appellants have produced various documentary evidences. Exhibit D/16 to D/27, D/32, D/33 and Exhibit T are the sale deeds produced on behalf of the plaintiffs from the period 1918 onwards till 1928 in which the purchasers are

Ritlal Singh's branch jointly which shows that during this period, i.e., 1918 to 1928, the branch of Ritlal Singh jointly were acquiring the properties in their separate names. In none of these deeds, members of the plaintiffs are included.

(32) Exhibit F/1 is usufructuary mortgage deed dated 01.05.1923 executed by ancestors of the defendants-appellants to one Sona Singh. In this deed also, the branch of Harakh Singh are not party. Exhibit T is exchange deed by which Ritlal Singh exchanged some property to Babu Khublal Singh. Therefore, the mortgagee or this Babu Khublal Singh being satisfied with the ownership of the Ritlal Singh, they were making transaction with him. This Exhibit T is dated 04.07.1928. Exhibit DD/1, Exhibit FF, Exhibit F, Exhibit D/2, Exhibit E/1 and Exhibit E read together will prove the fact that the lands recorded in the name of Chaman Singh along with Matuki Singh were dealt separately by branch of Harakh Singh. A mortgage deed was executed on 20.01.1911 which is Exhibit FF wherein it has clearly been mentioned that the property was his "khud hissa", i.e., his self-property. This Exhibit FF dated 20.01.1911 was executed by father of Chaman Singh in favour of Ritlal Singh for a period of 7 years. This document is admittedly an inter se transaction. If the parties were joint, there is no question of making any usufructuary mortgage by one coparcener in favour of other coparcener describing the property as his "khud hissa". No doubt, the property can be transferred by a member of the joint family but inter se transaction is strong circumstances to prove previous partition as has been held by Division Bench of this court in AIR 1977 Patna 59.

(33) It appears from Exhibit F that the property was again



mortgaged by Chaman Singh, Matuki Singh and Banarsi Singh to Misri Singh and Jalim Singh on 27.06.1931. In this Exhibit F, it has been mentioned that for legal necessity, Matuki Singh as karta of Harakh Singh branch executed the mortgage deed. Therefore, if Matuki Singh was karta in the year 1931 then how can there be a joint family consisting of the parties. According to the plaintiffs, after death of Ritlal Singh, Kali Singh is karta and after his death, the son of Kali Singh is karta. Moreover, if the parties were joint then there cannot be 2 kartas. Further, this document Exhibit FF shows the economic condition of the plaintiff's branch. Exhibit D/2 is the sale deed which shows that plaintiff, Banarsi Singh himself on 18.06.1943 sold the property in favour of Baldeo Singh and others. In the said sale deed, it is mentioned that for payment of loan and for purchasing ox and for household expenditure, the land was sold. If this is the statement then how can it be said that the parties were joint. It is not the case of the plaintiff that he was not being maintained by the joint family. Exhibit E and E/1 are two settlement deeds dated 07.11.1950 and 25.01.1952 executed by Banarsi Singh, plaintiff no.1 himself and on behalf of his two minor sons in favour of two persons. In Exhibit E/1, it has been mentioned that earlier another mortgage deed was executed in favour of mortgagee and in this Exhibit E/1, he himself described as karta of his family and he executed this on behalf of his two minor sons also. In Exhibit E, the plaintiff, Banarsi took loan of Rs.76 on 16.11.1951 for repayment of loan and for household expenditure. Therefore, from these Exhibits, it is clear that the branch of Harakh Singh also was dealing with the property separately as exclusive owner thereof and for repayment of loan which they took from various persons and that there was inter se transactions

between the parties.

(34) Exhibit J is the compromise petition filed by the branch of Ritlal Singh in Title Suit No.50 of 1929 dated 21.02.1932. This proves that there had been even partition between the sons of Ritlal Singh. The learned counsel for the respondents submitted that no final decree has been produced. The plaintiffs were not made party. Therefore, Exhibit is not binding. No doubt, this compromise decree will not bind the plaintiff if it will be proved that there had been no partition but if there had been partition as alleged by the defendants between the sons of Horil Singh then certainly this Exhibit-J is a circumstance to show that even the branch of Harakh Singh is separated by compromise decree. So far non-preparation of final decree is concerned, the compromise decree itself is final decree because the properties were allotted separately to the parties to compromise and the parties admitted their possession. There is no clause in compromise petition regarding any future course of action. In this connection, the decision of the Apex Court in the case of **Bimal Kumar Vrs. Shakuntala Devi, (2012) 3 Supreme Court Cases 548** is very clear. Therefore, the argument of the learned counsel for the respondent cannot be accepted.

(35) Exhibit D/30 is a sale deed dated 19.07.1902. This sale deed has been produced by the defendant to show that properties were even acquired by Ritlal Singh alone in the year 1902 separately. Exhibit D/20 is sale deed dated 11.06.1918 in favour of Kalicharan and Sia Prasad Singh, both sons of Ritlal Singh, Dwarika Singh and Chandrashekhar Prasad Singh, sons of Gopi Singh and grandson of Ritlal Singh. The executant of the sale deed is Nirsu Mahto. Likewise, these persons acquired the property through




Exhibit D/21, registered sale deed dated 22.07.1918, Exhibit D/22, registered sale deed dated 22.02.1919, Exhibit D/23, D/24 and D/25, all registered sale deeds dated 22.02.1919, Exhibit D/31, registered sale deed dated 22.04.1919, Exhibit D/17, registered sale deed dated 23.12.1919, Exhibit D/32, registered sale deed dated 20.07.1920, Exhibit D/18, registered sale deed dated 09.08.1920, Exhibit D/26, registered sale deed dated 17.05.1921, Exhibit D/19, registered sale deed dated 18.07.1922. These sale deeds have been produced by the defendants-appellants to show that when the sons of Ritlal Singh were joint, the properties were being acquired regularly in the names of the branch of Ritlal Singh. From perusal of these sale deeds, it appears that the properties have been acquired in the names of above persons, i.e., the branch of Ritlal Singh. The members or family of Harakh Singh branch is not mentioned. The learned counsel for the plaintiff-respondent submitted that Ritlal Singh was the karta, therefore, all the properties have been acquired either in his name and after his death in the name of his sons and grandsons. In my opinion, this is the only statement made by the plaintiff that Ritlal Singh became the karta. On the contrary, we have discussed the documentary evidences above wherein the plaintiff or his father described them as karta of their family. At this stage, it can safely be said that these are the documents which show that the branch of Ritlal Singh were acquiring the property separately.

(36) The defendants have also filed Exhibit D/16, sale deed dated 19.06.1925, Exhibit D/27, sale deed dated 08.05.1926, Exhibit D/33, sale deed dated 02.07.1928, all these deeds are also in the name of the branch of Ritlal Singh. The learned counsel for the appellant submitted that these

registered sale deeds show that after partition between the sons of Horil Singh, the branch of Ritlal Singh were acquiring the properties separately when they were joint till they partitioned their properties by compromise decree, Exhibit J.

(37) The defendant-appellants have produced Exhibit D/29, registered sale deed dated 16.08.1934, Exhibit D/28, registered sale deed dated 21.12.1936 which are in the name of Dwarika Prasad Singh, i.e., father of defendant nos.4 and 5, i.e., branch of Gopi Singh. It may be mentioned here that Gopi Singh is first son of Ritlal Singh. Exhibit D/35 is registered sale deed dated 14.05.1943 whereby some properties were sold by Udit Narayan Singh, father of defendant nos.19, 20 and 21 i.e., the branch of Kali Singh, the second son of Ritlal Singh. Exhibit D/3 is sale deed dated 11.11.1943 whereby Sia Prasad Singh, father of defendant nos.2 and 3 sold some land to Nirsu Rai. This Sia Prasad Singh is the third son of Ritlal Singh. Exhibit D/34 is sale deed dated 04.02.1944 whereby Udit Narayan Singh and Shankar Sharan Prasad Singh sold some property to one Ram Khelawan Singh. Exhibit D is sale deed dated 27.11.1951 whereby again Udit Narayan Singh sold some property to Ramawtar Singh. Exhibit D/4 is a registered sale deed dated 08.07.1955 whereby said Udit Narayan Singh again sold some properties to Ramswarup Singh. Exhibit D/1 is sale deed dated 04.06.1956 whereby defendant no.1 sold some properties to Ramawtar Singh, by Exhibit D/13, registered sale deed dated 23.07.1956, Pratap Narayan Singh and Gangotri Prasad Singh, defendant nos.2 and 3 and others sold some properties. Exhibit D/13, registered sale deed dated 23.07.1956 by which they again sold some properties. Exhibit D/15 is another sale deed dated



09.06.1960 sold by Udit Narayan Singh, father of defendant nos.19 to 21 to Ramawtar Singh. Likewise, Exhibit D/9 to D/12 are sale deeds dated 25.05.1974 and 08.06.1968 whereby Yadubansh Narayan Singh, defendant no.5 and defendant no.1 sold some properties to others. Exhibit D/5 to D/8 are the sale deeds dated 18.06.1974 whereby wife of Pratap Narayan Singh, defendant no.2 sold some properties to others. All these documents, i.e., the sale deeds from Exhibit D/29 mentioned in this paragraph onwards have been produced by the defendant-appellant to show that after partition between the sons of Ritlal Singh in Partition Suit No.58 of 1929 which was compromised in 1931, the parties were dealing the properties allotted to them as exclusive owner thereof. The members were either acquiring or selling the properties independently.


(38) Exhibit DD/8 is the khatiyani in the name of Chaman Singh and Matuki Singh, sons of Harakh Singh which shows their residence separately and in the boundary in the south, east and west, the house of Ritlal Singh has been mentioned. In plot no.921, house of Ritlal Singh has been mentioned and in the east, house of Chaman Singh has been mentioned. These Exhibits prove that the parties were residing separately.

(39) Exhibit A/28 is the municipal receipts dated 03.03.1939 in the name of Chandrashekhar Prasad Singh, Exhibit A/27, municipal receipts dated 22.01.1944 in the name of Chandrashekhar Prasad Singh, Exhibit A/15, the receipts dated 14.03.1945 in the name of Chandrashekhar Prasad Singh have been filed and likewise, the other Exhibit A series which are municipal receipts have been filed right from the year 1953 to 1970 which stands in the name of different defendants. It shows separate residence of the said persons.

(40) In view of the above documentary evidences, now it becomes clear that the parties were separate in mess, residence, cultivation and business since long, i.e., more than 6-7 decades. These documents also show that the parties were dealing with the properties separately as their exclusive properties and enjoying separately the usufruct thereof.


(41) The learned counsel for the defendant-appellant submitted that now after such a long period, when no contemporaneous documents are available and most of the participants in the transaction i.e., partition, passed away and when no direct evidence is available, the partition can be presumed from the cumulative effect of the separation of the parties for last more than half century without any objection and also from the subsequent conduct of the parties considering the independent acquisition, independent selling and also even inter se transactions.

(42) On the contrary, the learned counsel for the plaintiff-respondent submitted that it is only a cook and bulls story of the appellant that Harakh Singh separated from his two brothers. The parties were only cultivating the lands according to their convenience. From Exhibit 3/D which is registered deed of Mauja Gangaprasad, it will appear that the subtauji number is 9 which is Ijmal, Exhibit 3/E which is of Mauja Bishunpur Hemara which is Ijmal of three brothers and subtauji no.9, the separate account number of three brothers is 12 of 1880-81 in Register II which clearly indicates that three brothers were joint. Likewise, the learned counsel submitted that Exhibit 3/F is Register D of Mauja Chakjivan wherein also there is equal specification of shares and the account number of three brothers is 12 of 1880-81 in Register II. In Exhibit 3/G, all the three brothers have



been named in entry serial nos.6, 7 and 12 and then in 49 to 51. The specification of the shares is equal. The learned counsel further submitted that in column no.5 in front of entry no.6, 7 and 12, no subtauji number is given but the share has been shown as Ijmal, i.e., joint and the separate account is same of all the three brothers. Likewise, the learned counsel placed Exhibit 3/H, Register D of Mauja Maksapur Chintavan, Exhibit 3/I, Register D of Mauja Malpur and other Register D of Mauja Lodipur, Mauja Maksapur Yaku etc. and submitted that there is same account and the properties have been shown Ijmal. On the strength of these Exhibits, the learned counsel submitted that the three brothers had equal shares in all the Maujas. Subtauji number of all Maujas is same, account number is same and in some of the Exhibits jointness has also been shown and specification of shares of all the three brothers was without reference to any partition whatsoever. Therefore, all these documents point towards the jointness of all the three brothers and there is no strength in the story put forward by the appellants. The learned counsel further submitted that almost all the properties were acquired in the name of Ritlal Singh either through purchase or inheritance who was karta of the family and, therefore, it is joint family property. The learned counsel placing the Exhibit D series in its entirety one by one submitted that the three brothers were joint which is mentioned in Register D.

(43) So far these submissions of the learned counsel is concerned, it may be mentioned here that admittedly this Register D is revenue record of right. It appears that there are many mistakes in the entry and this document is of the year from 1895 to 1907-08. Therefore, the right



title and interest of the parties cannot be decided on the basis of this document after more than half century. The simple case of the plaintiff is that there had been no partition as alleged by the defendant. We have discussed the various documentary evidences and also the oral evidences. We have also seen the conduct of the parties and the independent transactions.

(44) The learned counsel for the plaintiff-respondent relied upon the decision of the Apex Court in the case of Bhagwan Dayal vs. Masomat Rewati Devi, AIR 1962 SC 287 and submitted that there is no presumption that when one member separates from others, the later remain united. Whether the later remains united or not must be decided on the facts of each case. In the present case, according to the learned counsel for the plaintiff-respondent, the Register D fully support that the properties were never partitioned and as discussed above, the three brothers were recorded Ijmal. Therefore, on the basis of the evidences it is apparent that there had been no partition as alleged by the defendant-appellant. Had there been partition, i.e., separation of Harakh Singh from his two brothers, the property could not have been recorded Ijmal in Register D.

(45) So far the above submission of the learned counsel is concerned, it can simply be said that we are not investigating as to whether the entry in the Register D is correct or wrong. As stated above these Exhibit D series are revenue record and on the basis of the same after more than half century, the rights of the parties cannot be determined. In other words, there can be no presumption that a particular state of affairs which was in existence during 1895 to 1907-08 or 1908-09 will continue to exist even after expiry of more than half century. Here, the partition suit has not been filed by one of

the brothers rather the suit has been filed by the plaintiff who himself is 4th generation from the original founder and likewise, some of the defendants are either 4th or 5th generation from the original founder, Horil Singh. Therefore, the presumption that Hindu family is presumed to be joint is almost nil in the present case.

(46) In the said decision relied upon by the plaintiff-respondent, i.e., Bhagwan Dayal(supra), it has been held by the Apex Court that in the old transactions when no contemporaneous documents are maintained and when most of the active participants in the transactions have passed away, though the burden still remains on the person who asserts that there was a partition, it is permissible to fill up gaps more readily by reasonable inferences than in a case where the evidence is not obliterated by passage of time.

(47) A Division Bench of this court in the case of **Arjun Mahto vs. Monda Mahatain, AIR 1971 Patna 215** following the decision of the Apex Court, Bhagwan Dayal's case(supra) held that the general principle is that every Hindu family is presumed to be joint unless the contrary is proved but this presumption can be rebutted by direct evidence or by course of conduct. When no contemporaneous documents are available the question whether the parties remain united or separate is to be decided on the facts of each case. The partition in such a case can be proved by the intention of the parties manifested by their subsequent conduct by their sole and independent enjoyment of the properties. Separation in food and residence for a long time among the brothers of a Hindu family, independent transactions of property, separate possession and enjoyment of properties are by themselves, no doubt, not conclusive but the cumulative effect of such facts may show that there had

been a partition between the brothers during their lifetime. It appears that in that case before the High court, there was allegation in the written statement that 80 years ago there had been partition between the three brothers.

(48) Here, in the present case at our hand, the plaintiff himself in the plaint admitted separate mess, separate cultivation and the documentary evidences discussed above clearly shows that the parties were acquiring the property and selling the properties independently. It further appears that there are inter se transactions between the parties as far back as in 1911. Therefore, since long the parties are enjoying the properties separately as their exclusive property. Separate residence is admitted. The plaintiff even admitted that the sons of Ritlal Singh also separated from each other. The defendants also proved Exhibit J which shows that there had been partition as far back as in the year 1929 by compromise, Exhibit J in Title Suit No.58 of 1929.


(49) A Division Bench of this court in the case of **Ram Bahadur Nath Tiwary vs. Kedar Nath Tiwari and others, AIR 1977 Patna 59** has held that “separate transactions by members of a joint family may not by themselves establish separation, but mutual transactions between two members of a family stand on an entirely different footing and they furnish a very strong evidence of separation.”

(50) Except Exhibit FF, the mortgage deed dated 20.01.1911 by Chaman Singh with Matuki Singh in favour of Ritlal Singh, the plaintiff himself in his evidence admitted that 9 acres and odd was given by Ritlal Singh to him for maintenance. This fact has also been incorporated in compromise application, Exhibit J. It is mentioned there that about 9 bighas land has already been given to the plaintiff's branch for maintenance as there

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was no property for their maintenance. If the parties were joint, there is no question of giving maintenance arises by one member to another member or by karta to a member of joint family.

(51) It may be mentioned here that the Division Bench of this court, i.e., **AIR 1971 Patna 215(Arjun Mahto vs. Monda Mahatain)** has subsequently been followed in the case of **Ganesh Sahu and another vs. Dwarika Sao and others, AIR 1991 Patna 1, Pata Sahu and another vs. Hiru Sahu and others, AIR 1991 Patna 276.** Again in the case of **Radhamoni Bhuiyanin and others vs. Dibakar Bhuiya and others, AIR 1991 Patna 95** following the above decisions this court held that it is now well settled that although there is a presumption of jointness in a Hindu family but that presumption is stronger where the parties are full brothers but such presumption gets weaker and weaker as time passes and parties in 3rd or 4th generation are presumed to be in separate possession of the lands. It is true that even in a case where a partition has taken place and if the share allotted to one of the parties is unconsciously disproportionate it is open to the court in a given case to reopen partition but in such a case the partition is admitted and is reopened at the instance of the plaintiffs. The principle of Hindu law is equality of division but inequality of division does not invariably lead to the conclusion that there was unequal division of the lands at the time of their partition. Here also, in the present case, it is not the case of the plaintiff that he is in possession of very meager portion of the land and also there is no pleading about inequality. Only allegation is that according to convenience, the sharers started cultivating separate lands. It is not the case that they started cultivating unequal shares. It appears that in the case of



Radhamoni Bhuiyanin(supra) also it was found that before cadastral survey settlement operation the parties were in separate possession, separate mess, separate residence and separate cultivating possession of lands in question, there had also been separate dealings of the properties amongst the parties inter se. Therefore, this court held that the conclusion of the trial court that there had been no partition by metes and bounds as such plaintiffs were entitled to decree for partition was illegal and the First Appeal was allowed.

(52) In the present case at our hand also, from the facts narrated above and the documentary evidences and even the pleadings, it is clear that since long, i.e., prior to cadastral survey settlement operation, the parties were residing separately, messing separately, dealing the property separately and even there is separate selling and inter se transactions. The learned court below has not considered the case in the light of these settled proposition of law laid down by the Apex Court as well as by this court and on the basis of the revenue record and on the basis of presumption only held that the defendants failed to prove partition. Therefore, in my opinion, the finding of the learned court below is unsustainable in the eye of law.

(53) In view of my above discussion, I find that there had already been partition between the parties since long. The defendants-appellants have been able to rebut the presumption of jointness and have placed reliable circumstances and explained the subsequent conduct of the parties from which it can readily be inferred that there had already been partition. Therefore, the finding of the learned court below on this point is set aside.

(54) From the discussion above, it appears that in the year 1967,

for the first time, the plaintiffs-respondents filed the suit for partition and dragged the appellants upto the High Court.

(55) In the case of **Salem Advocate Bar Association vs. Union of India, (2005)6 Supreme Court Cases 344**, the Apex Court held that “judicial notice can be taken of the fact that many unscrupulous parties take advantage of the fact that either the costs are not awarded or nominal costs are awarded against the unsuccessful party. Unfortunately, it has become a practice to direct parties to bear their own costs. In a large number of cases, such an order is passed despite Section 35(2) CPC. Such a practice also encourages the filing of frivolous suits. It also leads to the taking up of frivolous defences. Further, wherever costs are awarded, ordinarily the same are not realistic and are nominal. When Section 35(2) provides for costs to follow the event it is implicit that the costs have to be those which are reasonably incurred by a successful party except in those cases where the court in its discretion may direct otherwise by recording reasons therefor.”

(56) In the present case at our hand as discussed above, in view of the above overwhelming evidences produced by the defendants-appellants which were within the knowledge of the plaintiff filed the suit after such a long period and even included the properties in the partition suit which have already been sold to third parties and even those properties which belong to the strangers. Therefore, in my opinion, this is a fit case where the plaintiffs-respondents are liable to pay cost.

(57) In the result, this First Appeal is allowed. The impugned judgment and decrees are set aside and the plaintiff's suit for partition is dismissed with cost to be borne by the plaintiff throughout and in addition to



that, the plaintiffs are liable to pay the cost of Rs. 25,000 to the appellants within two months from today failing which the appellants are at liberty to realize the same through the process of the court.

(Mungeshwar Sahoo, J)

Saurabh/A.F.R.